

February 10, 2020

Via ECF

Honorable Paul G. Gardephe
United States District Judge
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

**Re: United States v. Avenatti, No. S1 19 Cr. 373 (PGG)
Letter Motion To Exclude Extrinsic Evidence**

Dear Judge Gardephe:

The defense respectfully writes to make a record with respect to certain exhibits it would have sought to offer in its case, but which we understand to be excluded based upon the Court's previous rulings. *See* attached DX FFF and DX GGG.

Today, the government offered GX 120, web history results pulled from Mr. Avenatti's cell phone for a Google search conducted on March 12, 2019 using the search terms: "internal investigations cost." In its case, without expected objection from the government (the parties are continuing to confer, but we are optimistic that we will reach agreement), the defense will offer a number of additional searches that Mr. Avenatti conducted from March 4 through March 18, 2019. What we will *not* offer, unless the Court permits, are DX FFF and DX GGG. As the Court can see, DX GGG contains a number of search terms that Mr. Avenatti googled between 7:46pm and 8:55pm EST, all on March 18, 2019. The two searches included in the exhibit are "how.much was boies schiller paid by theranos" and "theranos boies." DX FFF contains a number of web results that came up as a result of those searches, and it includes a number of results, such as (by way of example only) one article entitled "David Boies Pleads Not Guilty" – on which the Court has previously ruled – and another entitled "Theranos and David Boies Cut Legal Ties."

Although the Court has been clear and we do not seek here to reargue, we wish now to clearly state our reasoning for why we believe that these search terms and results are relevant and admissible. As the Court has stated many times, at the heart of this case is Mr. Avenatti's state of mind. We submit that the searches conducted by Mr. Avenatti in the time between his first meeting with Coach Franklin and his first meeting with the BSF lawyer provide a window into his thinking during this critical time. Among other things,

these searches show that Mr. Avenatti was highly interested in material describing allegations that the Boies firm recently had had a number of high-profile conflicts of interest, including in the Theranos matter. This research gives color to the back-and-forth between Messrs. Avenatti and Geragos about how they did not want BSF lawyers involved in the discussions or in the internal investigation. For example, the following exchange on March 13, 2019 was admitted today as GX 103B:

Geragos: Forwarded the email where they want us to go to them. I say we say our place or no place

Avenatti: Bigger issue is they want us to go to Boies and not meet with Nike directly.

Avenatti: That will be a disaster.

Geragos: Totally agree. Where are you?

Avenatti: . . . I think you should convey to your contact at Nike that we either directly deal with Nike or we don't meet. We are proposing to meet with lawyers at Nike so this should not be a problem. Between us, Boies will never step aside and allow us to run an investigation.

Geragos: Not only won't but they will sell Nike out...

The government has elicited significant testimony, including from Messrs. Wilson and Leinwand, that the proposal by Messrs. Avenatti and Geragos was a non-starter because they perceived a conflict. (*See, e.g.*, tr. 312). Mr. Avenatti sought to offer evidence, including in the form of DX FFF and DX GGG, to show that, indeed, Mr. Avenatti did significant research into perceived conflicts by the BSF firm that informs the above text and others.

Respectfully,

/s/ Scott A. Srebnick

Scott A. Srebnick

Jose M. Quinon

E. Danya Perry

Web History (17546)

#	Title	URL	Last Visited-Date	Last Visited-Time	Visits	Source	Source Extraction
3921	Theranos Whistleblower Shook the Company—and His Family - WSJ	https://www.wsj.com/articles/theranos-whistleblower-shook-the-companyand-his-family-1479335963	3/18/2019	3/18/2019 8:56:10 PM(UTC-4)	1	Safari	Legacy (3)
3922	Theranos and David Boies Cut Legal Ties - WSJ	https://www.wsj.com/articles/theranos-and-david-boies-cut-legal-ties-1479514351	3/18/2019	3/18/2019 8:56:01 PM(UTC-4)	1	Safari	Legacy (3)
3923	how.much was boies schiller paid by theranos - Google Search	https://www.google.com/search?q=how.much+was+boies+schiller+paid+by+theranos&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	3/18/2019	3/18/2019 8:55:52 PM(UTC-4)	1	Safari	Legacy (3)
3924	In New Theranos Book, Boies Schiller Doesn't Come Off So Great	https://www.google.com/amp/s/finance.yahoo.com/amphtml/news/theranos-book-boies-schiller-doesn-085624022.html	3/18/2019	3/18/2019 7:54:10 PM(UTC-4)	1	Safari	Legacy (3)
3925	how.much was boies schiller paid by theranos - Google Search	https://www.google.com/search?q=how.much+was+boies+schiller+paid+by+theranos&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	3/18/2019	3/18/2019 7:53:53 PM(UTC-4)	1	Safari	Legacy (3)
3926	The last days of Theranos the financials were as overhyped as the blood tests - MarketWatch	https://www.google.com/amp/s/www.marketwatch.com/amp/story/guid/AFD47E28-CB0B-11E8-9CDC-8834B4CD15BB	3/18/2019	3/18/2019 7:52:50 PM(UTC-4)	1	Safari	Legacy (3)
3927	how.much was boies schiller paid by theranos - Google Search	https://www.google.com/search?q=how.much+was+boies+schiller+paid+by+theranos&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	3/18/2019	3/18/2019 7:52:50 PM(UTC-4)	1	Safari	Legacy (3)
3928	how.much was boies schiller paid by theranos - Google Search	https://www.google.com/search?q=how.much+was+boies+schiller+paid+by+theranos&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	3/18/2019	3/18/2019 7:52:44 PM(UTC-4)	1	Safari	Legacy (3)
3929	David Boies's Risky Next Act - WSJ	https://www.wsj.com/articles/david-boies-has-a-new-mission-1544201352	3/18/2019	3/18/2019 7:50:28 PM(UTC-4)	1	Safari	Legacy (3)
3930	theranos boies - Google Search	https://www.google.com/search?q=theranos+boies&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	3/18/2019	3/18/2019 7:50:21 PM(UTC-4)	1	Safari	Legacy (3)
3931	Litigator David Boies parts ways with Theranos after disagreement over legal strategy - San Francisco Business Times	https://www.google.com/amp/s/www.bizjournals.com/sanfrancisco/news/2016/11/21/lawyer-david-boies-theranos.amp.html	3/18/2019	3/18/2019 7:49:51 PM(UTC-4)	1	Safari	Legacy (3)
3932	David Boies's Fall From Grace Above the Law	https://abovethelaw.com/2018/09/david-boies-fall-from-grace/	3/18/2019	3/18/2019 7:46:27 PM(UTC-4)	1	Safari	Legacy (3)
3933	David Boies Pleads Not Guilty	https://www.google.com/search?q=theranos+boies&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	3/18/2019	3/18/2019 7:46:20 PM(UTC-4)	1	Safari	Legacy (3)
3934	David Boies Pleads Not Guilty	https://www.google.com/amp/s/www.nytimes.com/2018/09/21/business/david-boies-pleads-not-guilty.amp.html	3/18/2019	3/18/2019 7:46:19 PM(UTC-4)	1	Safari	Legacy (3)
3935	theranos boies - Google Search	https://www.google.com/search?q=theranos+boies&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	3/18/2019	3/18/2019 7:46:18 PM(UTC-4)	1	Safari	Legacy (3)
3936	David Boies Pleads Not Guilty	https://www.google.com/amp/s/www.nytimes.com/2018/09/21/business/david-boies-pleads-not-guilty.amp.html	3/18/2019	3/18/2019 7:46:15 PM(UTC-4)	1	Safari	Legacy (3)
3937	theranos boies - Google Search	https://www.google.com/search?q=theranos+boies&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	3/18/2019	3/18/2019 7:46:15 PM(UTC-4)	1	Safari	Legacy (3)
3938	theranos boies - Google Search	https://www.google.com/search?q=theranos+boies&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	3/18/2019	3/18/2019 7:46:06 PM(UTC-4)	1	Safari	Legacy (3)
3939	Famed Documentarian Alex Gibney On His HBO Film On Elizabeth Holmes And 'The Psychology Of Fraud'	https://uproxx.com/movies/alex-gibney-interview-elizabeth-holmes-theranos-the-inventor-hbo/	3/18/2019	3/18/2019 7:45:31 PM(UTC-4)	1	Safari	Legacy (3)

**Defense
Exhibit
FFF**

S1 19 Cr. 373(PGG)

3940	Alex Gibney Interview: 'The Inventor' Director On Elizabeth Holmes	https://uproxx.com/movies/alex-gibney-interview-elizabeth-holmes-theranos-the-inventor-hbo/	3/18/2019	3/18/2019 7:45:27 PM(UTC-4)	1	Safari	Legacy (3)
3941	boies schiller internal investigation - Google Search	https://www.google.com/search?q=boies+schiller+internal+investigation&client=safari&hl=en-us&prmd=nvi&source=lnms&tbn=nws&sa=X&ved=2ahUKEwivxtTi7ozhAhURlJQIHUJ7AM8Q_AUoAXoECawQAQ&biw=375&bih=619	3/18/2019	3/18/2019 7:45:23 PM(UTC-4)	1	Safari	Legacy (3)
3942	"She Never Looks Back": Inside Elizabeth Holmes's Final Months at Theranos	https://www.google.com/amp/s/www.vanityfair.com/news/2019/02/inside-elizabeth-holmes-final-months-at-theranos/amp	3/18/2019	3/18/2019 7:44:51 PM(UTC-4)	1	Safari	Legacy (3)

Searched Items (6346)

#	Date	Time	Source	Value
1519	3/18/2019	3/18/2019 8:55:52 PM(UTC-4)	Safari	how.much was boies schiller paid by theranos
1520	3/18/2019	3/18/2019 7:53:53 PM(UTC-4)	Safari	how.much was boies schiller paid by theranos
1521	3/18/2019	3/18/2019 7:52:50 PM(UTC-4)	Safari	how.much was boies schiller paid by theranos
1522	3/18/2019	3/18/2019 7:52:44 PM(UTC-4)	Safari	how.much was boies schiller paid by theranos
1523	3/18/2019	3/18/2019 7:52:44 PM(UTC-4)	Safari	how.much was boies schiller paid by theranos
1524	3/18/2019	3/18/2019 7:50:21 PM(UTC-4)	Safari	theranos boies
1525	3/18/2019	3/18/2019 7:46:20 PM(UTC-4)	Safari	theranos boies
1526	3/18/2019	3/18/2019 7:46:18 PM(UTC-4)	Safari	theranos boies
1527	3/18/2019	3/18/2019 7:46:15 PM(UTC-4)	Safari	theranos boies
1528	3/18/2019	3/18/2019 7:46:06 PM(UTC-4)	Safari	theranos boies
1529	3/18/2019	3/18/2019 7:46:05 PM(UTC-4)	Safari	theranos boies

**Defense
Exhibit
GGG**

S1 19 Cr. 373(PGG)